

compensation for permanent total disability. Claimant argues his physical restrictions alone eliminate his ability to engage in substantial gainful employment.

Although respondent disagrees with the ALJ's finding regarding the percentage of claimant's wage loss, nonetheless, respondent concedes that even if its argued percentage of wage loss is adopted, claimant is still entitled to the \$100,000 maximum compensation payable for a permanent partial disability as a result of his work disability. But respondent argues that claimant's physical restrictions do not prevent him from engaging in substantial and gainful employment. Consequently, respondent argues claimant is not permanently and totally disabled and the ALJ's finding claimant is permanently partially disabled should be affirmed.

The sole issue before the Board is whether claimant is permanently and totally disabled as defined by K.S.A. 44-510c(a)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was injured when he slipped and fell while carrying a bag of cement. He injured his right knee and was provided treatment which included two arthroscopic procedures. An osteotomy was next performed but claimant developed an infection which ultimately resulted in removal of the hardware. Finally, claimant underwent a total right knee replacement. Although this procedure somewhat reduced his knee pain, it is significant that claimant developed a deep venous thrombosis of his femoral artery which required hospitalization where he was placed on anticoagulants.

The claimant's deep vein thrombosis has become chronic and claimant remains on Coumadin and his edema is treated with diuretics, elevation and a compression stocking. After the knee replacement claimant developed back problems caused by an altered gait as a result of the injury. It is undisputed that claimant's back problems as well as the deep vein thrombosis are a direct consequence of the May 4, 2000 work-related accident.

Dr. Paul S. Stein provided treatment for claimant's back which included a series of epidural steroid injections. The doctor provided restrictions and ratings but specifically limited those to claimant's back condition as he did not address claimant's right knee or deep vein thrombosis conditions. Dr. Stein opined claimant suffered a 5 percent functional impairment and imposed restrictions that claimant avoid repetitive bending or twisting of the lower back and no lifting greater than 75 pounds.

Dr. Philip R. Mills examined claimant on February 24, 2004, at the request of respondent. Dr. Mills concluded claimant was status post total right knee replacement with

arthroplasty. Claimant also had a deep venous thrombosis which complicated his total knee replacement as well as a popliteal cyst. The doctor related these conditions to claimant's May 4, 2000 accident. Based upon the *AMA Guides*¹, Dr. Mills limited his rating to claimant's deep vein thrombosis for which he opined claimant suffered a 37.5 percent functional impairment to the right lower extremity. Dr. Mills imposed permanent restrictions related to claimant's deep vein thrombosis that claimant should avoid prolonged standing or walking. Claimant should elevate his foot after swelling from standing or walking and he should change positions on an as-needed basis. Dr. Mills agreed that the frequency that claimant would be required to elevate his foot or leg would be unpredictable and dependent upon swelling. And Dr. Mills thought claimant could elevate his right lower extremity at the end of the workday although he agreed there might be occasions claimant would have to elevate his lower extremity during the workday. Dr. Mills testified:

Q: And if it got bad enough, he'd have to elevate it above the heart even during the workday, wouldn't he?

A: It might be possible. I don't think as a general rule that would be true, but there might be occasions where that would be necessary.²

Dr. George G. Flutter examined claimant on March 17, 2005, at the request of claimant's attorney. Based upon the *AMA Guides*, Dr. Flutter opined that claimant suffered a 5 percent functional impairment for his lumbar back; a 10 percent whole body impairment for his deep vein thrombosis; and a 30 percent whole body impairment for the right knee replacement which combined for a 40 percent functional impairment to the whole body. Dr. Flutter restricted claimant to the general sedentary level of lifting, carrying, pushing and pulling no more than 10 pounds on an occasional basis and negligible weight frequently. The doctor also restricted claimant from bending and twisting of the lumbar spine to an occasional basis and he should avoid stooping, squatting, kneeling, crawling and climbing. Dr. Flutter further noted claimant should avoid prolonged standing and walking with allowance made to change position as needed for comfort. Finally, the doctor concluded claimant should be allowed to elevate his right lower extremity above the level of the heart to reduce edema in the event that claimant had increased swelling. Dr. Flutter noted that the frequency that claimant would be required to elevate his right lower extremity would be dependent upon the swelling he experienced and would vary on an as-needed basis. Dr. Flutter testified:

Q. And on that last restriction, do you have any estimates of how often he would need to elevate his right lower extremity?

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² Mills Depo. at 19-20.

A. No, nothing specific. It would really have to kind of be based on how much swelling he has. It could vary.³

Doug Lindahl, a vocational rehabilitation counselor, met with claimant on October 13, 2003, at the request of claimant's attorney. Based upon the restrictions of Drs. Mills and Fluter, Mr. Lindahl opined that claimant would not be able to engage in substantial, gainful employment in the open labor market. In his report Mr. Lindahl stated:

In reviewing the restrictions given [by] Dr. Fluter, and utilizing my experience as a social security vocational expert I find that his inability to maintain prolonged standing and walking and limiting him to sedentary work is a significant handicap. Also the requirement that he must periodically elevate his right lower extremity to reduce edema basically removes him from competing for jobs in the open labor market. It is my opinion that without some type of significant improvement he will not return to substantial gainful activity in the open labor market.⁴

Specifically, Mr. Lindahl concluded the requirement that claimant be able to elevate his foot and change positions as needed would prevent substantial gainful employment, especially, if claimant needed to lie down to elevate his lower extremity above the level of his heart.

Steve L. Benjamin, a vocational rehabilitation consultant, met with claimant on August 12, 2005, at the request of respondent's attorney. Mr. Benjamin opined that although claimant does not have many transferable skills, Dr. Mills restrictions would not prevent claimant from earning an entry level wage. But Mr. Benjamin noted that Dr. Fluter's restriction that claimant elevate his leg above his heart would render claimant unemployable unless he could accomplish that during his breaks at work. In his report Mr. Benjamin stated:

It should be noted when looking at Dr. Fluter's posed permanent work restrictions, specifically "allowance should be made to elevate right lower extremity above the level of the heart as needed to reduce edema," this would render Mr. Tice unemployable. If Dr. Fluter means that Mr. Tice needs to elevate his leg after swelling from prolonged standing and walking, as Dr. Mills clarified, then he should be able to complete sedentary type work and the wage loss would be as stated above. If Dr. Fluter only means that he is to elevate his leg above the level of his heart and this is to be done throughout the day unscheduled, then Mr. Tice would be unemployable because most, if not any, employers will not allow this type of activity on the job-site.⁵

³ Fluter Depo. at 11.

⁴ Lindahl Depo., Ex. 2.

⁵ Benjamin Depo., Ex. 2 at 5.

Claimant has a ninth grade education and his work history is limited to physical labor. Claimant testified that about once an hour he needs to prop his leg up on another chair or ottoman to control the swelling in his leg. He further testified that about once a week the swelling becomes so bad that he must lie down and elevate his leg above his heart. Consequently, he must lay down for most of the day approximately one day a week. And when he sits for too long his back bothers him and he must get up and move around but when he stands for too long the swelling in his leg becomes a problem. Claimant thought he could perhaps work a few hours a day but he would be unable to work five days a week because when he has a bad day he would be unable to go to work.

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 1993), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁶ A totality of the circumstances approach is utilized in making the factual determination whether a workers compensation claimant has been rendered totally and permanently disabled.⁷

In *Wardlow*⁸, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

⁶ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁷ *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 102 P.3d 1169 (2004).

⁸ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

In this case, the claimant had several knee surgeries and ultimately a total right knee replacement. Significantly, he developed deep vein thrombosis and must elevate his right lower extremity to prevent swelling. Claimant also developed back problems from his antalgic gait. Consequently, claimant cannot sit or stand in captive positions for extended periods of time. Claimant has a 9th grade education and has essentially only performed physical labor such as a pipe fitter and stucco applicator which limits his transferrable job skills. Moreover, claimant detailed that he must prop his leg up on an hourly basis to prevent swelling and that if he sits too long he must change positions because of back pain. However, standing to alleviate the back pain exacerbates the swelling in his leg and requires him to sit down and elevate his leg. Finally, claimant noted that approximately once a week the swelling in his leg becomes so bad that he must lie down and elevate his lower extremity above his heart. And this usually takes the entire day to alleviate the condition. The facts in this case mirror the facts in *Wardlow* that resulted in the finding of permanent total disability.

Respondent argues that both Drs. Mills and Flutter provided restrictions that placed claimant in the sedentary work category and further offered opinions regarding task loss which indicates they did not conclude their restrictions would prevent claimant from engaging in substantial gainful employment. While this argument has some merit it overlooks the fact that both doctors agreed the claimant's need to elevate his right lower extremity was dependent upon the frequency of swelling. And Dr. Mills agreed that it might be necessary to elevate the leg during the workday. Claimant described the need to elevate his leg on an hourly basis and further described the need to lay down and elevate his leg above his heart approximately once a week. Both vocational experts concluded the requirement to elevate the leg rendered claimant unemployable. Consequently, the Board finds claimant has met his burden of proof to establish that he is permanently and totally disabled.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated January 24, 2006, is modified to find claimant is permanently and totally disabled.

The claimant is entitled to 178 weeks temporary total disability compensation at the rate of \$383 per week or \$68,174 followed by permanent total disability compensation at the rate of \$383 per week not to exceed \$125,000 for a permanent total general body disability.

As of June 30, 2006, there would be due and owing to the claimant 178 weeks of temporary total disability compensation at the rate of \$383 per week in the sum of \$68,174 plus 143.14 weeks of permanent total disability compensation at the rate of \$383 per week in the sum of \$54,822.62 for a total due and owing of \$122,996.62, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the

amount of \$2,003.38 shall be paid at \$383 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this 30th day of June 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director